No. _____

Supreme Court, U.S.
FILED

94-30 JUL - 5 1994

OFFICE OF THE CLERK

In the
Supreme Court of the United States
October Term, 1993

Margaret Coddington, personally and as Personal Representative of the Estate of Dean Coddington, Deceased, *Petitioner*,
v.
Wabash Life Insurance Company and Great Commonwealth Life Insurance Company, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Paul M. Warren
Counsel of Record
1601 Lewis Avenue, Suite 206
P.O. Box 21282
Billings, Montana 59104-1282
Telephone: (406) 245-2876

A. Clifford Edwards
1601 Lewis Avenue, Suite 206
P.O. Box 20039
Billings, Montana 59104-1282
Telephone: (406) 256-8155
Counsel for Petitioner

July 1994

38 pp

Question Presented

Where a district court has entered findings of fact which sustain a jury's award of punitive damages, and such findings of fact are required by state substantive law, is the Due Process Clause of the Fifth Amendment violated when the appellate court vacates the award without considering the district court's findings of fact?

Table of Contents

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Jurisdiction 1

Statutory Provision Involved 2

Statement 5

Reasons for Granting the Petition 8

Conclusion 13

Appendix . . . . .

Order Denying Rehearing 1A

Court of Appeals Memorandum 3A

District Court Order 14A

MCA 33-18-201 . . . . . 18A

MCA 33-18-242 . . . . . 18A

Table of Authorities

Cases — Page

Dees v. American Nat. Fire Ins. Co., 861 P.2d 141 (Mont. 1993) 14

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) 10,11

Salve Regina College v. Russell, 499 U.S. 225 (1991) 13,14

Statutes and Rules

28 U.S.C. §1254(1) 2

28 U.S.C. §1332 7

Rule 52(a), F. R. Civ. P. 13

MCA 27-1-221 2-5,8

MCA 33-18-201 7

MCA 33-18-242 7

In the Supreme Court of the United States
October Term, 1993

Margaret Coddington, Personally and as Personal Representative of the Estate of Dean Coddington, Deceased, *Petitioner*,

v.

Wabash Life Insurance Company and Great Commonwealth Life Insurance Company, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Margaret Coddington respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Ninth Circuit in this case.

Opinions Below

The opinion of the court of appeals is unreported. (App. p. 3). The findings of fact, conclusions of law, and order of the district court is unreported. (App. p. 14).

Jurisdiction

The court of appeals entered its judgement on January 26, 1994. (App. p. 3). Coddington's timely petition for rehearing and suggestion for rehearing *en banc* was denied on April 6, 1994. (App. p. 1). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutory Provisions Involved

1. Montana's punitive damages statute, MCA 27-1-221, reads as follows:

27-1-221. Punitive damages — liability — proof — award. (1) Subject to the provisions of 27-1-220 and this section, reasonable punitive damages may be awarded when the defendant has been found guilty of actual fraud or actual malice.

(2) A defendant is guilty of actual malice if he has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff and:

(a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff; or

(b) deliberately proceeds to act with indifference to the high probability of injury to the plaintiff.

(3) A defendant is guilty of actual fraud if he:

(a) makes a representation with knowledge of its falsity; or

(b) conceals a material fact with the purpose of depriving the plaintiff of property or legal rights or otherwise causing injury.

(4) Actual fraud exists only when the plaintiff has a right to rely upon the representation of the defendant and suffers injury as a result of that reliance. The contract definitions of fraud expressed in Title 28, chapter 2, do not apply to proof of actual fraud under this section.

(5) All elements of the claim for punitive damages must be proved by clear and convincing evidence. Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. It is more than a preponderance of evidence but less than beyond a reasonable doubt.

(6) Liability for punitive damages must be determined by the trier of fact, whether judge or jury.

(7) (a) Evidence regarding a defendant's financial affairs, financial condition, and net worth is not admissible in a trial to determine whether a defendant is liable for punitive damages. When the jury returns a verdict finding a defendant liable for punitive damages, the amount of punitive damages must then be determined by the jury in an immediate, separate proceeding and be submitted to the judge for review as provided in the subsection (7)(c). In the separate proceeding to determine the amount of punitive damages to be awarded, the

defendant's financial affairs, financial condition, and net worth must be considered.

(b) When an award of punitive damages is made by the judge, he shall clearly state his reasons for making the award in findings of fact and conclusions of law, demonstrating consideration of each of the following matters:

(i) the nature and reprehensibility of the defendant's wrongdoing;

(ii) the extent of the defendant's wrongdoing;

(iii) the intent of the defendant in committing the wrong;

(iv) the profitability of the defendant's wrongdoing, if applicable;

(v) the amount of actual damages awarded by the jury;

(vi) the defendant's net worth;

(vii) previous awards of punitive or exemplary damages against the defendant based upon the same wrongful act;

(viii) potential or prior criminal sanctions against the defendant based upon the same wrongful act;

(ix) any other circumstances that may operate to increase or reduce, without wholly defeating, punitive damages.

(c) The judge shall review a jury award of punitive damages, giving consideration to each of the matters listed in subsection (7)(b).

If after review the judge determines that the jury award of punitive damages should be increased or decreased, he may do so. The judge shall clearly state his reasons for increasing, decreasing, or not increasing or decreasing the punitive damages award of the jury in findings of fact and conclusions of law, demonstrating consideration of each of the factors listed in subsection (7)(b).

(8) Nothing in this section is intended to alter the Montana Rules of Civil Procedure governing discovery of a defendant's financial affairs, financial condition, and net worth.

Statement of the Case

Dean Coddington and his wife Margaret purchased Wabash Life Insurance Company's (Wabash) Cancer Policy in 1972. They paid monthly premiums on the policy for 17 years before Dean Coddington was diagnosed with, and died from, lung cancer. The policy promises to provide reimbursement for "hospital services and other expenses resulting from cancer." (Exhibit 5).

The Coddingtons filed several claims seeking reimbursemen. for expenses incurred by Dean Coddington for treatment of his cancer. Wabash denied coverage of three of the claims, maintaining in two

letters to Margaret Coddington that its policy "provides benefits only for the definitive treatment of cancer." (App. p. 12). Dean Coddington's treatments for low blood pressure, dehydration, and pneumonia, although directly arising from his cancer, (TR Vol. II p. 296-297), were, according to Wabash, not covered because they were not for the "definitive treatment of cancer." "Definitive treatment of cancer" is not defined in the policy.

After her husband's death, Margaret Coddington (Coddington) brought suit in the United States District Court for the District of Montana. Jurisdiction was based on diversity of citizenship, 28 U.S.C. §1332, the plaintiff being a resident of Montana and the defendant being incorporated and maintaining its principal place of business in Colorado. Coddington alleged, among other claims, breach of contract, and violation of Montana's Unfair Trade Practices Act (UTPA).

At trial, Coddington presented evidence that Wabash maliciously violated the UPTA by misrepresenting facts and policy provisions relating to coverage, MCA 33-18-201(1), (App. p. 18), and by failing to conduct a reasonable investigation of her claims. MCA 33-18-201(4). MCA 33-18-201(4) authorizes exemplary damages for

violations of subsections (1) and (4) of MCA 33-18-242(4). (App. p. 19).

In Montana, the issue of punitive damages is determined in a bifurcated trial. At the conclusion of the first phase of trial, the jury found Wabash liable for breach of contract, violation of the UPTA, and punitive damages. Wabash's motion for judgement notwithstanding the verdict was denied. On April 9, 1992, following the second phase of trial, the jury found Wabash liable for 1.6 million dollars in punitive damages. Judgement was entered the same day pursuant to Rule 58, F.R.Civ.P.

On May 5, 1992, the district court entered findings of fact and an order as required by MCA 27-1-221(7)(c):

> As reasons for making the award of punitive damages, the Court finds there was sufficient evidence of malicious conduct in this action to warrant an award of punitive damages. Although the amount of actual damages was less than $7,000.00, the egregious nature of defendants' conduct, coupled with the potential for recurrent episodes of that conduct, provide ample support for the jury's verdict of $1,600,000.00. In the final analysis, the Court, after considering all the factors found in Mont. Code Ann. Section 27-1-221(7)(b)(i-ix), finds that there are no issues of law or fact which would justify removing the issue of punitive damages from a duly appointed jury.

(App. p. 16).

Wabash appealed to the United States Court of Appeals for the Ninth Circuit, claiming that there was insufficient evidence to support an award of punitive damages. (App. p. 6).

The Ninth Circuit agreed. In a brief, unpublished memorandum, the court vacated the punitive damage award, holding that, as a matter of law, Wabash was not guilty of actual malice, and therefore no basis for punitive damages existed under Montana law. (App. p. 12). Although the district court's statutorily mandated findings of fact clearly show the court found sufficient evidence of malice to present the issue of punitive damages to the jury, the Ninth Circuit's memorandum fails to refer to, or even acknowledge, those findings of fact.

Reasons for Granting the Petition

I. The Court of Appeals Overlooked a Material Point of Fact and Law by Failing to Consider the Findings of Fact Entered by the District Court, Which are Mandated by Montana's Punitive Damages Statute

A. The Court of Appeals' Failure to Review the District Court's Findings of Fact Violates Coddington's Right to Due Process Guaranteed by the Fifth Amendment

The purpose of Montana's punitive damage statute is, in part, to assure the due process rights of *both* parties. The statute provides

numerous procedural safeguards to protect defendants against a deprivation of property. These safeguards meet and exceed the due process protections outlined by this Court in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

First, the statute provides for adequate restraints on jury discretion. *Id.* at 22. Punitive damages are only available if the trier of fact finds the defendant guilty of actual fraud or actual malice. MCA 27-1-221(1). Moreover, the amount of damages must be reasonable. *Id.* Finally, the imposition of punitive damages is permissive, not compulsory, 499 U.S. at 20.

Second, Montana's punitive damage statute ensures meaningful and adequate review by the trial court whenever a jury awards punitive damages. *Id.* This review process ensures that the award is reasonable and *accurate*. MCA 27-1-221(7)(b,c). The trial judge is required to review the award in light of nine enumerated factors. Many of these factors are substantially the same as those addressed by the Alabama courts and upheld as constitutionally valid in *Haslip*, 499 U.S. at 20-22.

Finally, Montana's punitive damage statute exceeds the due process requirements established in *Haslip*. MCA 27-1-221 requires proof of

every element by clear and convincing evidence, a standard approved of by this Court, 499 U.S. at 23, but not required by the Due Process Clause.

The purpose of requiring clear and convincing evidence is, in part, to assure the accuracy and correctness of an award of punitive damages. The Ninth Circuit held that the award was incorrect. By vacating the punitive damage award based solely on the jury's verdict, without acknowledging the district court's statutorily mandated findings of fact, the Ninth Circuit circumvented a critical section of the statute which was *designed to ensure the correctness of a punitive damage award.* As a result, Coddington has been denied her right to fair process guaranteed by the Fifth Amendment.

Without doubt, if the district court had entered findings of fact affirming a *denial* of punitive damages, and the Ninth Circuit had reversed that verdict without consideration of the district court's findings of no malice, Wabash, or any other defendant, would vehemently argue that its due process rights were violated by the reviewing court ignoring the mandated district court review.

Certainly, the guarantee of fair process to defendants found in Montana's punitive damage statute also extends a reciprocal right of

fair process to victims of malice. The right to fair process seems especially important where a plaintiff has successfully overcome the substantial procedural obstacles and the high burden of proof imposed by Montana's punitive damage statute.

Coddington presented substantial evidence of actual malice, which, according to the jury and the district court, fully complied with Montana's rigid requirements of proof for an award of punitive damages. In a cursory eight page memorandum, the Ninth Circuit vacated the award and entered judgement for Wabash without even acknowledging the district court's statutorily mandated findings of fact. As a result of this error, Coddington's right to due process has been denied.

B. The Court of Appeals Applied the Wrong Standard of Review and Therefore Erred in Reversing Coddington's Punitive Damage Award

The Ninth Circuit reviewed the denial of Wabash's motion for JNOV *de novo*. (App. p. 10). While the court properly applied that standard of review to the legal issue of breach of contract, the court improperly applied the same standard to the factual determination of malice required for an award of punitive damages under Montana law. Where findings of fact are required, as they are here under Montana's

punitive damage statute, the correct standard of review is whether the district court's findings constitute clear error. Rule 52(a), F. R. Civ. P. This Court recently stated:

> In deference to the unchallenged superiority of the district court's factfinding ability, Civil Rule 52(a) commands that a trial court's findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Salve Regina College v. Russell, 499 U.S. 225, 233 (1991).

The district court, after hearing all the testimony, viewing all the documents and other exhibits at trial, and after having the opportunity to assess the credibility of the witnesses, entered findings of fact stating that there was clear and convincing evidence of malice sufficient to support the award of punitive damages.

At a minimum, the appellate court should review the district court's mandatory review of a punitive damage award under an "abuse of discretion" standard. As the Montana Supreme Court held:

> A district court judge, having heard the evidence and observed the witnesses, is in the best position to determine whether the requirements of proof of punitive damages have been met....Judge Langen's interpretation of Damron's testimony is consistent with the primary purpose of punitive damages, which is to punish a wrongdoer and deter further unlawful conduct, and we will not overrule it absent an abuse of discretion.

Dees v. American Nat. Fire Ins. Co., 861 P.2d 141, 150 (Mont. 1993).

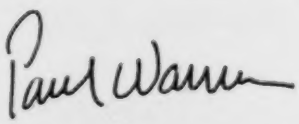
By failing to consider and review the district court's findings of fact, the Ninth Circuit clearly failed to show any deference to the "unchallenged superiority of the district court's factfinding ability." *Salve*, 499 U.S. at 233.

Obviously, a reviewing court cannot determine clear error without first reviewing the district court's findings of fact. Coddington respectfully requests this Court to correct this degradation of her right to fair process by reinstating the jury's verdict, or in the alternative, by ordering the Ninth Circuit to consider and review the district judge's findings of fact under the proper standard of review.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Paul M. Warren
Counsel of Record
1601 Lewis Avenue, Suite 206
P.O. Box 21282
Billings, Montana 59104-1282

Telephone: (406) 245-2876

A. Clifford Edwards
1601 Lewis Avenue, Suite 206
P.O. Box 20039
Billings, Montana 59104-1282
Telephone: (406) 256-8155
Counsel for Petitioner

July 1994

APPENDIX

FILED
APR 6 1994
Cathy A. Catterson, Clerk
U.S. Court of Appeals
No. 92-35397
DC No. CV-90-208-BLG-JDS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARGARET CODDINGTON, Personally and as Personal Representative of the Estate of C. Dean Coddington, Deceased,	)	
Plaintiff-Appellee,	)	
v.	)	**ORDER**
WABASH LIFE INSURANCE COMPANY and GREAT COMMONWEALTH LIFE INSURANCE CO.,	)	
Defendants-Appellants.	)	

Appeal from the United States District Court
for the District of Montana

Before: GOODWIN and HUG, Circuit Judges, and MCKIBBEN,[1] District Judge.

[1] The Honorable Howard D. McKibben, United States District Judge for the District of Nevada, sitting by designation.

The panel, as constituted in the above case, has voted to deny appellee's petition for rehearing. Judge Hug has voted to reject the suggestion for rehearing en banc, and Judges Goodwin and McKibben have recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no active judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED** and the suggestion for rehearing en banc is **REJECTED**.

FILED
JAN 26 1994
Cathy A. Catterson, Clerk
U.S. Court of Appeals
No. 92-35397
DC No. CV-90-208-BLG-JDS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARGARET CODDINGTON, Personally and as Personal Representative of the Estate of C. Dean Coddington, Deceased, Plaintiff-Appellee, v. WABASH LIFE INSURANCE COMPANY and GREAT COMMONWEALTH LIFE INSURANCE CO., Defendants-Appellants.	**MEMORANDUM**[2]

Appeal from the United States District Court
for the District of Montana
Jack D. Shanstrom, District Judge, Presiding

Argued and Submitted November 5, 1993
Seattle, Washington

[2] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: GOODWIN and HUG, Circuit Judges, and MCKIBBEN,[3] District Judge.

In January of 1989, Dean Coddington was diagnosed as having lung cancer. From February of that year until his death on July 6, 1989, Dean Coddington was hospitalized on several occasions. During all relevant times of his diagnosis and hospitalization, Dean Coddington held a cancer insurance policy issued by Wabash Life Insurance Co. ("Wabash"). This was a "benefits schedule" insurance policy which provided cash payments to Dean Coddington as a supplement to benefits paid to him under his separate Blue Cross/Blue Shield policy. The Wabash policy stated that it provided benefits for losses "resulting from hospital confinement and other specified expenses incurred for the definitive treatment of cancer." The policy does not define "definitive treatment of cancer."

From April until August 1989, Dean Coddington filed seven claims under the Wabash policy. Wabash approved four of these claims and paid $7,344.60. Wabash, however, denied the other three claims based upon its conclusion that those claims involved hospitalizations and treatments which were not covered by the cancer policy. These

---

[3] The Honorable Howard D. McKibben, United States District Judge for the District of Nevada, sitting by designation.

hospitalizations involved the treatment of low blood pressure, dehydration and pneumonia. Dean Coddington's wife, Margaret Coddington ("Coddington"), disputed this denial of coverage and brought suit in Montana Federal District Court.[4] Coddington alleged five state law claims: (1) breach of contract; (2) breach of implied contractual duties; (3) violation of Montana's Unfair Trade Practices Act ("UTPA"); (4) actual fraud; and (5) constructive fraud.

At trial, Coddington presented evidence that her husband's treatment for low blood pressure, dehydration and pneumonia was a direct result of lung cancer. Wabash presented evidence of its analysis of the three claims at issue and its decision that these claims did not represent treatment of cancer and were, therefore, not covered by the cancer policy.

At the close of the Plaintiff's case, the trial judge denied Wabash's motion for directed verdict. At the conclusion of the first phase of

---

[4] Jurisdiction in the district court was based upon 28 U.S.C. § 1332.

trial,[5] the jury found Wabash liable for breach of contract, violation of the UTPA and punitive damages. The jury awarded Coddington $6,383 on the contract claim and returned a special verdict finding that Wabash's conduct was not fraudulent. The trial judge then denied Wabash's motion for judgment not withstanding the verdict ("JNOV"). At the end of the second phase, the jury awarded Coddington $1.6 million in punitive damages. Wabash appeals this verdict and award on several grounds, generally claiming that there was insufficient evidence to support a finding of breach of contract or to award punitive damages.

A. The Contract Claim

The district court's denial of Wabash's motion for JNOV on Coddington's contract claim is reviewed by this Court *de novo*. *Erickson v. Pierce County*, 960 F.2d 801, 804 (9th Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 815 (1992).

Wabash claims that the scope of coverage under its policy was unambiguous, that it expressly covered only expenses for the treatment

---

[5] Montana's punitive damages statute requires a bifurcated trial procedure. In the first phase, the jury determines whether the defendant is liable for punitive damages. In the second phase, the jury decides the amount of any punitive damages. MCA § 27-1-221.

of cancer and that it incorporated a pathological definition of cancer which limited the scope of the cancer policy. Wabash contends Dean Coddington was not treated for cancer during the three hospitalizations at issue. In addition, Wabash points to the failure of Coddington to offer any evidence of damages. Without this evidence, Wabash argues, the court erred in submitting the contract claim to the jury.

We do not find the policy was unambiguous as a matter of law. It did not define the "definitive treatment of cancer" and included inferences that the policy covered expenses "related to" the treatment of cancer. Under Montana law, when the wording or phraseology in an insurance contract taken as a whole is subject to two different interpretations, it is ambiguous. *Canal Ins. Co. v. Bunday*, 813 P.2d 974, 977 (Mont. 1991). When ambiguous, a determination of the actual meaning of an insurance contract is a question of fact for the jury. *Gray v. City of Billings*, 689 P.2d 268, 270 (Mont. 1984); *McNussen v. Graybeal*, 405 P.2d 447, 454 (Mont. 1965). In addition, any ambiguities in an insurance policy are construed against the insurer. *Wellcome v. Home Ins. Co.*, 849 P.2d 190, 192 (Mont. 1993).

Coddington's contract claims raised questions of the proper interpretation of the insurance policy. Because the policy was ambiguous, its proper interpretation was a question of fact for the jury to resolve.

In addition, although Coddington did not offer evidence directly on the issue of damages, the court determined that any damages could be mathematically determined by the jury through application of the rate schedule within the policy to the number of hospitalizations and treatments at issue.[6] There was sufficient evidence in the record to support the jury's verdict on damages for breach of contract. Moreover, Montana law establishes breach of contract as a legal wrong regardless of any showing of actual damages. *Kitchen Krafters, Inc. v. Eastside Bank of Montana*, 789 P.2d 567, 571 (Mont. 1990).

Finally, we reject Wabash's contention that the jury was improperly instructed on the contract claim. Instructions 23 through 29 concerned the definition and the legal effects of an ambiguous provision in an insurance policy. These instructions accurately reflect Montana

---

[6] The Wabash cancer policy includes a "Schedule of Benefits" which outlines the benefits available under the policy by the number of days in a hospital, number of days of out-patient care or the specific treatment involved. (Appellant's Exc. at 88.)

law, and the district judge did not abuse his discretion in so instructing the jury. Therefore, we affirm the judgement awarding damages to Coddington on the contract claim.

B. The Punitive Damages Award

The district court denied Wabash's motion for directed verdict and its motion for judgement notwithstanding the verdict on the issue of punitive damages. An appeal does not lie from a denial of a motion for a directed verdict. *Locricchio v. Legal Service Corp.*, 833 F.2d 1352, 1356 n.2 (9th Cir. 1987). A denial of a motion for JNOV is reviewed *de novo* to determine if the plaintiff's claims were supported by substantial evidence. *Erickson*, 960 F.2d at 804. It is error to deny a motion for JNOV when it is clear that the evidence and its inferences cannot reasonably support a judgement in favor of the opposing party. *Id.*

Although Wabash may have acted negligently in handling Coddington's claims, the evidence did not reasonably support a finding that the insurer acted maliciously. Accordingly, the district court erred when it denied Wabash's motion for JNOV.

Section 27-1-221(1) of the Montana Code ("MCA") allows reasonable punitive damages when the defendant has been found guilty of actual fraud or actual malice. Both actual fraud and actual malice are defined in the statute as follows:

> (2) A defendant is guilty of actual malice if he has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff and:
> (a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff; or
> (b) deliberately proceeds to act with indifference to the high probability of injury to the plaintiff.
>
> (3) A defendant is guilty of actual fraud if he:
> (a) makes a representation with knowledge of its falsity; or
> (b) conceals a material fact with the purpose of depriving the plaintiff of property of legal rights or otherwise causing injury.

MCA § 27-1-221(2), (3). In addition, the statute requires that all elements of a claim for punitive damages be established by "clear and convincing evidence," a standard higher than preponderance of the evidence. MCA § 27-1-221(5).

The jury specifically found that Wabash's conduct was not fraudulent. Therefore, any punitive damage award must be based upon clear and convincing evidence of actual malice.

Coddington argues that the evidence of actual malice was sufficient to support the verdict under the clear and convincing standard of proof.

In support of this argument, Coddington relies on three areas of proof. First, Coddington points to the failure of the cancer policy to define the phrase "definitive treatment of cancer" and to the policy language stating that the policy "provides benefits for hospital services and other expenses resulting from cancer." Coddington argues that this language expressly covers Dean Coddington's hospitalizations and that Wabash's denial of coverage, therefore, shows malice.

Second, Coddington argues that the testimony of Guthrie and Little, claims analysts for Wabash, regarding the language used in the letters sent to Coddington denying coverage, shows malicious behavior because the letters contained language which was not found in the policy.[7] Coddington contends the evidence shows the language used was intentionally "made up" to deny coverage.

Third, Coddington argues that this testimony also shows indifference on the part of Wabash through the claims analysts' focus upon the actual treatment received by Dean Coddington and not upon

---

[7]The language at issue in the two letters is similar and reads as follows:

> Unfortunately, this is a cancer treatment policy which provides benefits only for the definitive treatment of cancer. No benefits are provided, nor premiums charged to covered [sic] the expenses of treating any other condition even if that condition has some connection to the underlying cancer.
>
> (Appellant's Exc. at 75, 76.)

whether the treatment had a direct connection to his lung cancer. This aspect of Wabash's investigation was insufficient and unreasonable, providing additional proof of Wabash's malice toward the Coddingtons.

At most, this evidence shows the nature of the contractual dispute relative to the coverage of the cancer policy and is not clear and convincing evidence of any actual malice by Wabash. The letters denying coverage simply restated the language of the policy and the carrier's reasonable interpretation of that language. The letters contained no intentional misrepresentations. In addition, Wabash's focus upon the actual treatment received by Dean Coddington shows a coverage dispute based on the scope of the cancer policy. Finally, a lack of malice is also evident from Wabash's coverage of other claims submitted by Coddington for treatment of his lung cancer. Wabash's willingness to cover these claims while denying is strong evidence of a coverage dispute, not of actual malice.

The evidence was insufficient to show clearly and convincingly that Wabash had knowledge of facts or intentionally disregarded facts that created a high probability of injury to Dean Coddington. Without evidence of actual malice, there is no basis under Montana law for

punitive damages. We therefore reverse the judgement awarding punitive damages.

Having concluded the punitive damage judgement should be vacated, we do not reach Wabash's other contentions.

Accordingly, the judgement below is AFFIRMED in part and REVERSED in part.

FILED
MAY 5 1992
A. C. Edwards, Secretary
DC No. CV-90-208-BLG-JDS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARGARET CODDINGTON, Personally and as Personal Representative of the Estate of C. Dean Coddington, Deceased,	)	
Plaintiff-Appellee,	)	
v.	)	**ORDER**
WABASH LIFE INSURANCE COMPANY and GREAT COMMONWEALTH LIFE INSURANCE CO.,	)	
Defendants-Appellants.	)	

On April 9, 1992, trial in this matter concluded with a special verdict on the issue of punitive damages. This six-member jury panel handed down a verdict award in the amount of $1,600,000.00. Pursuant to Federal Rules of Civil Procedure, judgement was entered later that same day.

As discussed earlier in this case, substantive Montana law applies in this diversity action. *Erie Railroad v. Tompkins*, 304 U.S. 64

(1938). Accordingly, the Court instructed the jury to consider punitive damages pursuant to **Mont. Code Ann. Section 27-1-221.** Having adopted this substantive rule of law, the Court acknowledges its procedural aspects, especially those found in **subsections (7)(b)** and **(c)**. **Subsection (b)** provides:

> When an award of punitive damages is made by the judge, he shall clearly state his reasons for making the award in findings of fact and conclusions of law, demonstrating consideration of each of the following matters:
>
> (i) the nature and reprehensibility of defendant's wrongdoings;
>
> (ii) the extent of defendant's wrongdoing;
>
> (iii) the intent of the defendant in committing the wrong;
>
> (iv) the profitability of defendant's wrongdoing, if applicable;
>
> (v) the amount of actual damages awarded by the jury;
>
> (vi) the defendant's net worth;
>
> (vii) previous awards of punitive or exemplary damages against the defendant based upon the same wrongful act; and
>
> (ix) any other circumstances that may operate to increase or reduce without wholly defeating punitive damages.

Mont. Code Ann. Section 27-1-221(7)(b). Even where punitive damages are awarded by special jury verdict, the Court must review the award, giving consideration to the factors listed above. **Mont. Code Ann. Section 27-2-221(7)(c).**

As findings of fact and conclusions of law in this matter, the court relies specifically upon the transcript of proceedings and the instructions of law submitted to the jury.

As reasons for making the award of punitive damages, the court finds that there was sufficient evidence of malicious conduct in this action to warrant an award of punitive damages. Although the amount of actual damages was less than $7,000.00, the egregious nature of defendants' conduct, coupled with the potential for recurrent episodes of that conduct, provide ample support for the jury's verdict of $1,600,000.00. In the final analysis, the court after considering all of the factors found in the **Mont. Code Ann. Section 27-1-221 (7) (b) (i-ix)**, finds that there are no issues of law or fact which justify removing the issue of punitive damages from a duly-appointed jury.

Accordingly, IT IS ORDERED that, after considering the factors found in **Mont. Code Ann. Section 27-1-221 (7) (b)**, the jury verdict shall remain as handed down on April 9, 1992.

The Clerk of Court shall forthwith notify the parties of the making of this order.

DONE and **DATED** this _____ day of May, 1992.

Jack D. Shanstrom (*original signed*)

United States District Judge

33-18-201. Unfair claim settlement practices prohibited. No person may, with such frequency as to indicate a general business practice, do any of the following:

(1) misrepresent pertinent facts or insurance policy provisions relating to coverages at issue;

(2) fail to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

(3) fail to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

(4) refuse to pay claims without conducting a reasonable investigation based upon all available information;

* * *

33-18-242. Independent cause of action - burden of proof.

(1) An insured or a third-party claimant has an independent cause of action against an insurer for actual damages caused by the insurer's violation of subsection (1), (4), (5), (6), (9), or (13) of 33-18-201.

(2) In an action under this section, a plaintiff is not required to prove that the violations were of such frequency as to indicate a general business practice.

(3) An insured who has suffered damages as a result of the handling of an insurance claim may bring an action against the insurer for breach of the insurance contract, for fraud, or pursuant to this section, but not under any other theory or cause of action. An insured may not bring an action for bad faith in connection with the handling of an insurance claim.

(4) In an action under this section, the court or jury may award such damages as were proximately caused by the violation of subsection (1), (4), (5), (6), (9) or (13) of 33-18-201. **Exemplary damages may also be assessed in accordance with 27-1-221.** (Emphasis added).

* * *